

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA)
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)
VS.) CR 00-0141 L
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GREGORY FLOYD)

MOTION TO VACATE OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255;
DEFENDANT CONVICTED UNDER 18 U.S.C. § 924(c)

Now comes Defendant through undersigned counsel, and moves to vacate and correct his sentence pursuant to 28 U.S.C. § 2255 and *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015) (*Johnson II*).

Mr. Floyd was convicted of use and possession of a firearm during and in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c). The predicate crimes of violence were carjacking, death resulting, and conspiracy to commit carjacking in violation of 18 U.S.C. §§ 371 & 2119(3).

In *Johnson II*, the Supreme Court struck the “residual clause” of the Armed Career Criminal Act (“ACCA”) violent felony definition, *see* 18 U.S.C. § 924(e)(2)(B)(ii), as unconstitutionally vague. In *Welch v. United States*, 136 S. Ct. 1257 (2016), the Supreme Court held that the rule announced in *Johnson II* is substantive and therefore retroactive to cases on collateral review. The residual clause at 18 U.S.C. § 924(c)(3)(B) is substantially similar to the ACCA’s residual clause, struck in *Johnson II*. Following *Johnson II*, §924(c)(3)(B) is also void for vagueness. *See In re Hubbard*, No. 15-276, 2016 WL 3181417 (4th Cir. June 8, 2016); *Dimaya v. Lynch*, 803 F.3d 1110, 1115 (9th Cir. 2015); *United States v. Vivas-Ceja*, 808 F.3d 719,720, 723 (7th Cir. 2015). Because the Supreme Court declared *Johnson II* retroactive as a substantive rule, the vagary of §924(c)(3)(B)

should also apply retroactively. *See, e.g., Bousley v. United States*, 523 U.S. 614, 620 (1998) (decision narrowing the elements of § 924(c) was retroactive).

Mr. Floyd's carjacking convictions satisfied 18 U.S.C. § 924(c) based on the now defunct residual clause. After *Johnson II*, defendant no longer has the predicate convictions to satisfy 18 U.S.C. § 924(c) and is therefore actually innocent of that offense. He is presently in the custody of the Bureau of Prisons serving an invalid sentence that is based on this conviction.

A Memorandum in Support of this Motion will be filed in accordance with this court's scheduling order.

Respectfully submitted
Gregory Floyd
By his attorney,

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CERTIFICATION

I hereby certify that a copy of this MOTION was delivered by electronic notification to Donald Lockhart, Assistant United States Attorney, on June 24, 2016.

/s/ *Kevin J. Fitzgerald*